Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

J.E. SIMMONS,

Petitioner,

v.

WEBSTER COUNTY, acting by and through its BOARD OF COUNTY COMMISSIONERS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

REAGAN W. DEAN
State Bar No. 214862
Counsel of Record for Petitioner

127 Church Street
Suite 340
Marietta, Georgia 30060-1949
(770) 425-1335

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Does the statutory and case law of the State of Georgia fail to protect the legal and constitutional rights of private landowners contesting condemnation action by a governmental body seeking to condemn and take private property?

LIST OF PARTIES

The names of all parties to this case appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, J.E. Simmons, prays that a writ of certiorari issue to review the judgment entered in this case by the Court of Appeals of Georgia on March 4, 1997; Application for Writ of Certiorari to the Supreme Court of Georgia denied on September 12, 1997.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN CASE BY COURTS

Oral Order of the Superior Court of Webster County, State of Georgia on February 5, 1996, denying the Petitioner's exceptions and objections to the condemnation proceeding, which is not reported and is transcribed in the Appendix hereto at App. 15-26.

Simmons v. Webster County, 225 Ga. App. 830 (485 S.E. 2d 501) (1997), Court of Appeals of Georgia, Case No. 896A1861, Decision dated March 4, 1997, Reconsideration Denied April 1, 1997, which is reprinted in the Appendix hereto at App. 1-14.

Denial of Writ of Certiorari, dated September 12, 1997, by the Supreme Court of Georgia, *J.E. Simmons v. Webster County*, Case No. S97C1218, which is reprinted in the Appendix at App. 27.

STATEMENT OF THE BASIS OF JURISDICTION

The date of the Judgment sought to be reviewed is September 12, 1997, the date the Supreme Court of Georgia denied the Petitioner's Petition for Writ of Certiorari of the Georgia Court of Appeals' Decision issued March 4, 1997.

This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1257.

28 U.S.C. § 2403(b) may apply and the Attorney General for Georgia shall be notified pursuant to Rule 29.4(c).

STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Special Master Act, Georgia Law 1957, Page 387 as amended, for expedited condemnation proceedings found at O.C.G.A. §§ 22-2-100 through 22-2-114, which is set forth in the Appendix at App. 28-45.

Official Code of Georgia §§ 22-2-61 through 22-2-63, which is set forth in the Appendix at App. 45-47.

United States Constitution, Amendment V to the Constitution, which states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be

> twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV. Section 1 to the Constitution, which states:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Georgia Constitution, 1983, Article 1, Section 1, Paragraph 1 which states, "No person shall be deprived of life, liberty, or property except by due process of law."

Georgia Constitution, 1983, Article 1, Section 1, Paragraph 2, which states, "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the law."

STATEMENT OF THE CASE

This case arises from a condemnation proceeding in Webster County, Georgia. That proceeding included Petitioner's timely written exceptions contesting the validity

and constitutionality of the condemnation proceeding itself. The Petitioner raised the federal questions sought to be reviewed in his written "Exceptions of J.E. Simmons, Condemnee and Special Master's Findings, Ruling, and Award", filed July 31, 1995, in the trial court, set forth in the Appendix, App. 48-53, and in his "Answer and Defenses of Condemnee, J.E. Simmons", filed of record in the trial court on August 7, 1995, set forth in the Appendix, App. 54-61.

The questions were denied by the trial court in its oral ruling and hearing on February 5, 1996, and record of the oral ruling is found in the transcript in the Appendix at App. 15-26.

The Georgia Court of Appeals denied Petitioner's appeal of the exceptions and questions in a decision of March 4, 1997. *See*, Decision of the Georgia Court of Appeals, App. 1-14.

The Petitioner, as a private landowner, was a condemnee in the case.

The Respondent was the condemnor.

This case arises from the trial court's denial of Petitioner's written exceptions contesting the legality and constitutionality of the Special Master's findings, rulings, and awards, and the condemnation proceedings itself. The trial court's denial was rendered without conducting a *de novo* hearing; without receipt of evidence and testimony; and without providing any statutory or constitutional protections to the Petitioner.

The Respondent filed its Petition for In Rem Condemnation of an easement or a lease-hold interest before

a Special Master on July 5, 1995. This was an expedited proceeding under the Special Master Act, Georgia Laws, 1957, as amended. The statutes are found in the O.C.G.A. in § 22-2-100 through § 22-2-114, included in the Appendix (App. 28-45).

The Respondent sought an easement to rebuilt an earthen dam and county road that sat on top of the dam. The dam and county road had been washed out in the flooding of the summer of 1994.

The Petitioner owns the land on both sides of the earthen dam and county road. He purchased that land in 1988 from the previous private landowner, Millard Kennedy.

In 1956 or 1957 the Respondent had obtained a 60 foot easement and built the earthen dam and county road on top of the dam. Kennedy Lake was not created by the Respondent. It was not created by Respondent's construction of the dam and county road in 1956 or 1957. It was created by Millard Kennedy, as private landowner upon his own land adjacent to the dam in July 1957.

Kennedy Lake was not a public lake and was not created by the Respondent; it was a private lake created by a private landowner (Petitioner's predecessor in title) on his own land; it had drainage boards on the private land on Petitioner's land which controlled the level of water in the land. The Respondent had no title to the land covered by the water backed up by the drainage controls; the Respondent had no easement to the land covered by the water; the Respondent was not authorized to decide whether the private land owned by the Petitioner should be covered with water after the earthen dam was rebuilt.

In the summer flooding of 1994, a flood washed out the earthen dam and the lake water drained off the Petitioner's land. Approximately 37 acres of Petitioner's land were uncovered by this draining.

Thereafter, the Petitioner as a private landowner, decided to plant pine trees upon the 37 acres of land in December 1994.

The Respondent's condemnation action seeks to increase the existing dam easement from 60 feet to 140 feet; to change the slope of the dam; fill the Petitioner's adjacent land with water; change the former lake from a private lake to a public access lake; create new public parking facilities within the expanded easement; invite the public to fish in the lake; and place a new drainage control system within the expanded 140 foot easement so Respondent can control the flow of the water to back-up water on Petitioner's land.

The water would not automatically back-up on Petitioner's land when the dam was rebuilt. Rather, the water can be retained or drained out of the drain pipes that Respondent intends to place within its expanded 140 foot easement. The Petitioner previously had control of the drainage controls when the easement was only 60 feet wide.

The Petitioner objected, excepted, and contested the Respondent's plans to reflood his private land to create a public access and public use lake on his private land where no such public lake had previously existed. A Special Master's Hearing was held on Respondent's Petition for Condemnation on Friday, July 21, 1995. The Special Master then made an award pursuant to the

statutorily mandated form as to value only. The award was made the judgment of the trial court.

The Petitioner timely filed his written Exceptions to the Special Master's Finding, Ruling, and Award. The Petitioner also timely filed his separate written Answer and Defenses.

The questions sought to be reviewed were raised by the Petitioner in his written "Exceptions of J.E. Simmons, Condemnee, to Special Master's Finding, Ruling, and Award", filed July 31, 1995, in the trial court (App. 48-53).

The questions were also raised in Petitioner's "Answer and Defenses of Condemnee, J.E. Simmons", filed of record in the trial court on August 7, 1995 (App. 54-61).

On February 5, 1996, the trial court conducted a short and brief hearing on the Petitioner's Exceptions to the Special Master's Finding, Ruling, and Award (App. 15-26).

The Petitioner's written exceptions and the trial court's hearing on the exceptions raised questions of fact, including the purpose of the proposed taking; whether there had been an adverse possession by the Respondent; whether Respondent seeks to create public parking and public access to a public lake to be made on Petitioner's adjoining land; whether the taking proposed by the Respondent is excessive or is actually needed to do the dam and road projects; whether it takes from the Petitioner private property that Petitioner is not being compensated for; whether there are other ways to do the project; whether the taking of Petitioner's land is without

due process and protection and without authority of law, and without giving Petitioner adequate and just compensation.

The trial court denied the Petitioner's exceptions in total, without conducting an evidentiary or a hearing *de novo* on the exceptions. The trial court simply, after oral argument concerning the issues, denied the exceptions.

The Petitioner subsequently appealed the trial court's oral ruling and the jury's value award to the Georgia Court of Appeals. The Georgia Court of Appeals denied Petitioner's appeal on his exceptions in its decision of March 1997.

The Georgia Court of Appeals subsequently denied the Petitioner's Motion for Reconsideration.

The Petitioner filed an Application for Writ of Certiorari to the Georgia Supreme Court. The Georgia Supreme Court denied the Petitioner's Application on September 12, 1997.

ARGUMENTS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully shows that the Court should grant his Petition for Writ of Certiorari. The issues involve the rights of Georgia citizens to contest the taking of their private land in condemnation proceedings.

The Petitioner shows that the State of Georgia has enacted a statutory framework that does not protect the citizen's rights nor provide due process protection. Georgia has enacted statutes that only deal with the amount of

compensation to be paid to the landowner. No statutes nor procedures exist to protect his rights to contest the taking of his land in the first instance.

In this case, the Webster County Board of County Commissioners utilized the expedited taking mechanism found in the Special Master Act, Georgia Laws, 1957, as amended. This is codified in the O.C.G.A. § 22-2-100 through § 22-2-114.

The Special Master Act does not protect the citizen's rights to raise non-value exceptions and objections to the taking of his land. O.C.G.A. § 22-2-108 statutorily defines and delineates the powers and duties of the Special Master.

> "The special master shall serve in lieu of the board of assessors; and his duties and authority, except as otherwise provided in this article, shall be the same as provided by Code Sections 22-2-61 through 22-2-63. The special master shall hold the hearing provided in Code Section 22-2-102 at the time and place provided by the order of the judge of the superior court and in compliance with the duties and authority conferred by this article. The special master shall not be authorized to continue or delay the hearing, except as otherwise provided by Code Section 9-10-150, relating to granting continuances by reason of membership in the General Assembly during sessions thereof, or except upon the written order of the judge of the superior court; and such a continuance shall be granted only for good cause shown to that judge. When it shall be necessary for the judge to grant a continuance, the continuance shall be for not more than

> five days from the date of the order granting a continuance."

Code Sections 22-2-61 through 22-2-63 do not give the Special Master any authority to hear, receive evidence upon, and issue any determination as to non-value issues raised by the private citizen. Indeed, the entire Special Master Act does not authorize the private citizen to raise non-value objections to the condemnation proceeding.

There is no authority nor discretion in the Special Master when he conducts the hearing. He is required by the Georgia Legislature to make an award as requested by the Condemnor following the hearing held pursuant to O.C.G.A. § 22-2-102. *See*, O.C.G.A. § 22-2-110 which states in part:

> "(b) The award shall become a part of the record of the proceedings in said matter and shall condemn and vest title to the property or other interest in the condemning body upon the deposit by that body of the amount of the award into the registry of the court, subject to the demand of said condemnee or condemnees, according to their respective interests."

The Georgia Legislature has mandated that the Special Master use the award form contained in O.C.G.A. § 22-2-110(c) and shall condemn and vest title in the condemning body. That award form concerns only the issue of value.

O.C.G.A. § 22-2-110(d) provides the method by which the citizen may appeal Special Master's award as to the issue of value, but not as to any non-value issues. It is to be a *de novo* investigation.

The trial court, upon receipt of the Special Master's award is statutorily required to condemn the citizen's property. O.C.G.A. § 22-2-111 provides:

> "Upon the entry of the award of the special master and the presentation of the award to the judge of the superior court, the judge shall enter a proper order and judgment of the court condemning the described property or other interest in rem to the use of the condemnor upon the condemnor's paying into the registry of the court the amount provided in the award of the special master."

The entire statutory scheme addresses only the amount of compensation to be paid by the condemnor. It allows no contesting of the condemnation proceeding by the condemnee. Indeed, the Legislature has statutorily mandated that the Special Master and the trial court *shall* condemn the property sought by the condemnor.

Due process is not afforded to the affected citizen in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 1, Paragraph 1 of the Georgia Constitution, 1983; and, Article 1, Section 1, Paragraph 2 of the Georgia Constitution, 1983.

Here, the Petitioner's due process rights were ignored and disregarded by the taking of his private land. The State of Georgia has devised the statutory scheme that only permits Petitioner to contest the value of his land to be taken. No contesting of the taking of his land is permitted by the Georgia statutes. Again, these statutes mandate that the Special Master and trial court shall condemn the Applicant's land.

In the absence of statutory protections, the Georgia appellate courts have created an ambiguous and changing non-statutory set of case law for consideration of non-value objections. This non-statutory scheme is ever-changing and is made by the appellate courts out of whole cloth. Indeed, the case by case changes and requirements illustrate the lack of due process protection to the citizens of the State of Georgia.

The State of Georgia has two systems of review of condemnation proceedings. There is a detailed and specific statutory procedure for review of value issues. Then, there is undefined changing, non-statutory caselaw system for review of non-value issues.

This ever-changing and shifting caselaw framework can be seen by the appellate decisions in the State of Georgia.

For example, the statutes do not specify that non-value factual issues are to be determined by the trial court without a jury. However, in *Leach v. Ga. Power Co.*, 228 Ga. 16, 22(5) (183 S.E. 2d 755) (1971) it held that the right to appeal "does not carry with it the right to a jury trial on the other issues in the case."

The Special Master Act does not require non-value exceptions to be filed within ten days of the Special Master's award. The appellate court has judicially created this requirement. *See, Sims v. City of Toccoa*, 256 Ga. 368, 370 (349 S.E. 2d 385) (1986): "In order to comply with due process requirements, we hold that the ten days in which to file exception to value issues applies to non-value issues."

Although the Special Master Act does not require the trial court to pass on non-value issues prior to entering and filing judgment of condemnation, O.C.G.A. § 22-2-111, this requirement has been judicially created. *See, Zuber Lumber Company v. City of Atlanta,* 237 Ga. 358, 365 (227 S.E. 2d 362) (1976).

Under the Special Master Act the condemnee is not entitled to a written ruling by the trial court as to its decision to overrule timely non-value exceptions and objections. *See* the instant appeal decision, *Simmons v. Webster County.*

The Special Master Act does not specify what language is necessary to obtain trial court review of non-value exceptions. (Again, because not contemplated that the Special Master would determine them.) The appellate courts have issued decisions stating which condemnees have used appropriate language to request review of non-value issues and which condemnees have not. In *Beck v. Cobb County,* 180 Ga. App. 808, 810 (350 S.E. 2d 818) (1986), it was judicially determined that the condemnee's choice of words ("Appeal to Superior Court/Appeal to Jury Trial" appealing the case "in its entirety to the [superior court] and [demanding] a jury trial") did not satisfy the non-specified, nonstatutory requirements to get a hearing. In that case, *supra,* p. 811, it was held that the condemnee had the responsibility to "assist" the speedy process of the taking of his private land by making specific and not general objections or exceptions to the award of the Special Master. No such requirement has been created by statute. It has simply been judicially determined to exist.

Further, the appellate courts have determined that, although the Special Master Act, Georgia Law, 1957, is silent as to the review of non-value issues, the condemnee must file exceptions to the Superior Court prior to its entry of judgment on the Special Master's award. *See, Styers v. Atlanta Gas Light Co.*, 263 Ga. 856, 857(1) (439 S.E. 2d 640) (1994).

O.C.G.A. § 22-2-110(d) specifies that an appeal of the value award shall be by jury trial and shall be a *de novo* investigation. Again, the Special Master Act is silent as to the appeal and the determination of non-value legal and factual issues. By caselaw, the appellate courts have held that value issues are determined by the jury and non-value issues by the trial court itself.

Because it does not address consideration or appeal of non-value issues, the Special Master Act is silent as to how it is done. Into this vacuum various decisions have entered. In *Wrege v. Cobb County*, 186 Ga. App. 512 (367 S.E. 2d 817) (1980), the appellate court held:

> "The trial judge, however, determined that he was not going to conduct the proceedings [on the non-value exceptions] *de novo*, but instead decided to review the decision of the special master as though occupying an appellate position in the proceedings, thereby addressing only whether there was any evidence to support the special master's finding of fact and whether there were any errors of law in the special master's Conclusions of Law."

This "any evidence" standard of review was held incorrect. The condemnee was entitled to a *de novo* re-adjudication of the non-value issues. However, in the

instant case, *Simmons v. Webster County Board of Commissioners, supra,* it was held that the trial court was not required to conduct an evidentiary hearing on the non-value exceptions because to do so would allow new evidence which was not before the Special Master or a repetition of the evidence which should have been preserved by a transcript. This contradicts previously announced rationale of holding a *de novo* re-adjudication on the non-value issues. This, again, illustrates the ever-changing and shifting requirements of the Georgia appellate courts issued when a citizen attempts to contest the condemnation proceeding. The caselaw is not only changing, but contradictory. The effect of this is to deny the citizen the right of due process and equal protection to contest the taking of his private property. The condemnee's rights to contest non-value legal and factual issues are not grounded in a statute nor constitutional provisions, and are subject to the flow of changing and contradictory caselaw. This ever-changing uncertainty is shown in the Appellate Court rulings. In *Beck v. Cobb County, supra,* the condemnee did not file specific exceptions, but simply appealed the case in its entirety. This was held not to be sufficient to invoke a *de novo* investigation of the Special Master's ruling. In the instant case, the Petitioner filed his written exceptions, but did not present to the trial court a transcript of the proceedings before the Special Master. Since the Special Master followed the specific mandated statutory award form, the Georgia Court of Appeals held that the Applicant did not preserve a record of rulings which the court could have reviewed. The Petitioner and other Georgia citizens' due

process rights under the U.S. Constitution and the Georgia Constitution require a full and fair hearing before the trial court. The guarantees of protection of person and property, being a paramount duty of government, are not met by a determination that was made without an impartial and complete hearing. Georgia Constitution, 1983, Article 1, Section 1, Paragraph 2.

These constitutional protections are meaningless to the affected landowner if the trial court is not required to conduct a *de novo* trial on the non-value issues; if the trial court is not required to receive evidence and testimony on non-value issues; if the trial court can simply hear a portion of oral argument and then deny the objections in total.

The Petitioner respectfully shows that the State of Georgia has not provided constitutional protections to citizens of Georgia to contest the taking of their private property. The State of Georgia has created a dual system of condemnation proceedings. The Special Master and trial court are statutorily required to grant the condemnation sought by the condemnee. Only an ambiguous and ever-changing, and sometimes contradictory set of appellate cases deal with any non-value exceptions and objections the affected citizen may have.

CONCLUSION

The Petitioner respectfully request that this Court grant its Petition for Certiorari to present these matters in full to the Court.

Respectfully submitted,

REAGAN W. DEAN
State Bar No. 214862
Counsel of Record
for Petitioner

127 Church Street
Suite 340
Marietta, Georgia 30060-1949
(770) 425-1335